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No.

IN

SUPREME COURT OF

October T

HARRY J. COWHERD, M.D
KENTUCKY CABINET
RESOURCES - -

versus

SAMUEL DOE, by His M
Friend, MARY DOE, Et

PETITION FOR A WRIT
UNITED STATES C
FOR THE SI

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September 30, 1988

WESTERFIELD-BONTE CO., 619 W. KENT

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THE UNITED STATES

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SECRETARY,
FOR HUMAN
- - - - Petitioner

ther and Next
l. - - Respondents

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URT OF APPEALS
TH CIRCUIT

AN M. HALLORAN
General Counsel

ANLEY A. STRATFORD
ILLIAM K. MOORE
Office of the Counsel
Cabinet for Human Resources
275 East Main Street — 4 West
Frankfort, KY 40621
Telephone: (502) 564-7900
Counsel for Petitioner

CKY—P.O. BOX 3251, LOUISVILLE, KY.

730P

QUESTIONS PRESENTED

1. Whether the admissions procedures of a State residential treatment center for the mentally retarded which permit a guardian to provide the substituted consent of his adult ward for admission to the facility on a voluntary basis violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment.

2. Whether the Due Process Clause of the Fourteenth Amendment requires periodic judicial review of the continued placement of adult mentally retarded persons in a State residential treatment center when such persons were voluntarily admitted to the facility upon application of their guardians.

LIST OF PARTIES

The parties to the proceedings below consisted of:

a. Harry J. Cowherd, M.D., Secretary of the Kentucky Cabinet for Human Resources and

b. Samuel Doe, by and through his mother and next friend, Mary Doe, on his own behalf and as the representative of a class consisting of all mentally retarded persons in the Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution or other mental retardation residential treatment center involuntarily on the basis of their condition of mental retardation and who contend that said involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, 29 U.S.C. § 794, and KRS Chapters 202A, 202B, 210 and 31.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HARRY J. COWHERD, M.D., SECRETARY, KENTUCKY CABINET FOR HUMAN RESOURCES - - - - - - *Petitioner*

v.

SAMUEL DOE, by His Mother and Next Friend, MARY DOE, Et Al. - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Harry J. Cowherd, M.D., Secretary of the Kentucky Cabinet for Human Resources, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-styled proceeding on June 15, 1988. A Petition for Rehearing En Banc was denied on August 3, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported at 848 F. 2d 1386 (6th Cir. 1988) and is reprinted in the Appendix hereto, page 1a, *infra.*

The third and final Opinion of the United States District Court for the Western District of Kentucky is reported at 663 F. Supp. 597 (W.D. KY 1986) and is reprinted in the Appendix hereto, page 22a, *infra.*

The second Opinion of the United States District Court for the Western District of Kentucky is not reported. The decision is printed in the Appendix hereto, page 33a, *infra.*

The initial Opinion of the United States District Court for the Western District of Kentucky is not reported. The decision is printed in the Appendix hereto, page 42a, *infra.*

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on June 15, 1988. (App. p. 1a). Petitioner's Petition for Rehearing En Banc was denied by Order entered August 3, 1988. (App. p. 21a).

The jurisdiction of this Court to review the Opinion of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Petitioner[1] is the chief executive and administrative officer of the Kentucky Cabinet for Human Resources

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[1]Elbert Austin, appellee below, resigned from his position as Secretary of CHR effective November 30, 1987 and was succeeded in office by Harry J. Cowherd, M.D. Pursuant to F. R. Civ. P. 25(d)(1) Dr. Cowherd has automatically been substituted as the interested party in this action.

(CHR). CHR is the state agency which operates Kentucky's programs for the mentally retarded, including the state's mental retardation residential treatment centers. At last count there were 769 residents in CHR's residential treatment centers. (Trial Record, hereafter R. 114, p. 1).

Respondent, Samuel Doe, is a severely retarded adult who was admitted to a residential treatment center as a voluntary admission upon the substituted consent of his legal guardian, Mary Doe, who is also his mother.

CHR's voluntary admission process is initiated by an application for admission filed by the parent of a minor or the legal guardian of an adult through one of the state's Community Health Centers. (R. 36, pp. 12-13). The application requires the Director of the Community Health Center to certify that the mentally retarded person cannot be served in the community. (R. 73, p. 44). The application is accompanied by a psychological evaluation of the applicant; a physical evaluation of the applicant; the applicant's school records; and the individual habilitation plans developed for the applicant by the Community Health Center in its unsuccessful effort to provide services to the applicant in the community. (R. 36, p. 13).

The application and accompanying records are submitted by the Community Mental Health Center to CHR's Record Review Committee. This Committee consists at a minimum of a physician, a psychologist,

a social worker, a registered nurse and a licensed practical nurse. (R. 36, pp.11-12). These professionals review the application with this accompanying records and then invite the applicant, his parents, his guardian, and a representative from the Community Mental Health Center to attend a conference addressing the applicant's needs. (R. 36, p. 14).

The factors considered by the Records Review Committee in determining whether to grant the application for admission include: (1) the availability of appropriate alternative residential and training programs in the community; (2) the availability of an appropriate place within a residential treatment center; (3) the severity of the applicant's handicap; (4) the status of the applicant's family situation; (5) the applicant's developmental history; (6) all previous efforts to provide services to the applicant; and (7) the applicant's need for basic services such as toilet training, basic survival skills, physical therapy and occupational therapy. (R. 36, pp. 19-21).

If the Records Review Committee determines that the applicant is appropriate for admission to a residential treatment center, the Committee then determines which facility is most appropriate for the applicant's needs. (R. 36, pp. 21-22). The vast majority of approved admissions are for severely or profoundly retarded individuals. Mildly or moderately retarded individuals must have concomitant severe behavior

problems or a substantial physical disability to satisfy the admissions criteria.[2] (R. 36, p. 72).

When a person is admitted to a residential treatment center following the Records Review Committee process, the applicant's legal guardian signs the applicant into the facility. CHR considers such admissions as "voluntary" and the applicant can leave anytime he chooses or if removed by his legal guardian. (R. 36, p. 27).

A guardian is specifically authorized by state law "to take custody of the ward and to establish his place of abode within the state." Kentucky Revised Statute (KRS) 387.660. The guardian has specific duties to make provision for the ward's care, comfort and maintenance and to arrange for such educational, social, vocational, and rehabilitation services as are appropriate and as will assist the ward in the development of maximum self-reliance and independence. KRS 387.-660(2). A guardian must act with respect to his ward in a manner which limits the deprivation of civil rights

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[2]The degrees of mental retardation with their corresponding intelligence quotients are as follows:

Degree	I.Q.
Mild	50 - 75
Moderate	25 - 50
Severe	15 - 25
Profound	1 - 14

(R. 34, p. 19)

The functional level of a person with severe mental retardation would be comparable with that of a normal two or three year old child. A profoundly retarded person would function at the level of a nine to twelve month old infant. (R. 36, p. 84).

and restricts his ward's personal freedom only to the extent necessary to provide needed care and services to the ward. KRS 387.660(4).

If a guardian places his ward in a residential facility, the guardian must notify the state district court of such placement within thirty days. KRS 387.660(1). This notice must include: (1) the specific reasons for such placement; (2) an interdisciplinary evaluation report detailing the social, psychological, medical or other considerations upon which the placement was predicated; (3) a description of the treatment or habilitation programs which will benefit the ward as a result of such placement; and (4) a determination that such placement will provide the ward with appropriate treatment in the least restrictive setting. KRS 387.660(1). Upon review of such reports, the state district court is authorized to take whatever action it considers necessary to enhance the well-being of the ward. KRS 387.670(3).

Placement in a residential treatment center is not viewed as a permanent placement. (R. 36, pp, 15, 64). An interdisciplinary team composed of the facility staff responsible for providing treatment and habilitation to the residents conducts staffings monthly to assess each resident's need to remain at the residential treatment center. (R. 36, p. 30).

If a person admitted to a residential treatment center on a voluntary basis chooses to leave the facility, the facility staff may initiate proceedings for involuntary hospitalization. (R. 36, p. 27). A person may

be involuntarily committed to a residential treatment center only following a judicial determination at a full due process trial-type hearing that (1) the person is mentally retarded; (2) the person is a danger to himself or others; (3) a residential treatment center is the least restrictive mode of treatment available; and (4) that reasonably beneficial treatment is available at a residential treatment center. KRS 202B.040.

Less than 1% of the residents of Kentucky's residential treatment centers for the mentally retarded have been admitted on an involuntary basis. (R. 37, p. 22).

By contrast, the majority of the residents at Kentucky's psychiatric hospitals for the mentally ill are admitted through the involuntary admission process.

Respondents, plaintiffs below, instituted this civil rights action under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4) to challenge petitioner's voluntary admission procedures.

In its initial Memorandum Opinion in this matter, the District Court observed that this Court had specifically approved voluntary admission of minors in similar circumstances in *Secretary of Public Welfare of Pennsylvania* v. *Institutionalized Juveniles,* 442 U.S. 640, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979). (R. 106, pp. 9-10). The District Court then examined petitioner's admissions procedures in light of the Due Process Clause and the Equal Protection Clause of the 14th Amendment and found no constitutional violations. (R. 106, pp. 10-13).

However, in its second Memorandum Opinion, the District Court held that since the great majority of profoundly and severely retarded persons were incapable of making the decision to be placed in a residential treatment center, all such placements must be considered involuntary. (R. 117, p. 3). The Court then held that since these admissions were involuntary as a matter of state law, all such admissions must be made pursuant to the state statutes setting forth the procedures for involuntary hospitalization of the mentally retarded. (R. 117, pp. 7-8). The Court further found that petitioner was violating the mentally retarded's right to Equal Protection because he was not requiring that involuntary admission procedures be instituted prior to their admission. (R. 117, pp. 9-11). The District Court did note that persons diagnosed as having a mild or moderate degree of mental retardation could be voluntarily admitted to a residential treatment center, but only upon their own application and not upon the application of their guardian. (R. 17, p. 9).

After issuance of the District Court's second Memorandum Opinion, the Kentucky General Assembly passed House Bill 477 (1986 Kentucky Acts Chapter 79) to clarify that Kentucky law did not require the determination made by the District Court.

House Bill 477 added a new paragraph to KRS 202B.040 which provided:

> The application by parents or guardians for placement for their retarded family member or ward

> in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in KRS 202B.-010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B.

In its third Memorandum Opinion, the District Court observed that House Bill 477 effectively eliminated the right of mentally retarded persons to a judicial hearing prior to placement in a residential treatment center and that most admissions would now be considered voluntary. (R. 126, p. 2). The Court then held that placement of adult mentally retarded persons in a residential treatment center without a prior judicial hearing was a violation of Due Process. (R. 126, p. 4). The Court further held that denying prior judicial hearings for the mentally retarded was a violation of the Equal Protection Clause since prior hearings were routinely provided for the mentally ill. (R. 126, pp. 6-8). The District Court further held that following their admissions under the involuntary admissions procedures, the mentally retarded were entitled to periodic judicial review of their placement in residential treatment centers. (R. 126, p. 8). The Court then enjoined petitioner from admitting any mentally retarded person over age 18 to CHR's residential treatment facilities without instituting prior judicial proceedings for involuntary hospitalization and from continuing to confine any mentally retarded person at such facilities who reaches age 18 without

instituting involuntary admissions procedures. (R. 127, pp. 1-2).

Petitioner appealed the injunction to the Sixth Circuit Court of Appeals which agreed with the District Court that admissions of mentally retarded adults to residential treatment facilities by their guardians must be considered involuntary admissions. (Slip Opinion, p. 12). After finding that judicial involuntary hospitalization proceedings were not required under the Due Process Clause, the Sixth Circuit held that the Equal Protection Clause requires Kentucky to utilize judicial proceedings to involuntarily hospitalize its mentally retarded since Kentucky uses judicial proceedings to involuntarily hospitalize its mentally ill. (Slip Opinion, pp. 16-17).

Petitioner's Petition for Rehearing En Banc was denied on August 3, 1988. This Petition now follows.

REASONS FOR GRANTING THE WRIT

This petition presents the Court with an opportunity to clarify to what extent the principles established in *Parham* v. *J.R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) and *Secretary of Public Welfare of Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 64, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979), for admission of minors to state residential facilities for the mentally retarded apply to the admission of adults to such facilities.

Parham and *Institutionalized Juveniles* found no constitutional violations in state practices which per-

mitted parents and guardians to voluntarily admit their minor children and wards for treatment in state hospitals for the mentally ill and the mentally retarded provided an inquiry was made by a neutral factfinder to determine that the admissions criteria were satisfied. The Court recognized that the decision to be made by the neutral factfinder was essentially medical in character and held that the facility's admitting physician could adequately perform that function without an adversary proceeding or judicial involvement.

The voluntary admission procedures utilized by CHR's facilities in the case at bar are very similar to those approved in *Parham*.

The distinction between this case and both *Parham* and *Institutionalized Juveniles* is that the respondents in the case at bar have reached the statutory age of majority. Each respondent has also been adjudicated incompetent to manage his affairs in a full adversarial trial-type hearing. Each respondent has a legal guardian who has a specific statutory duty to arrange for respondent's development of maximum self-reliance and independence through provision of educational, social, vocational and rehabilitative services which minimally restrict the respondent's personal freedom.

A state guardian's statutory duty to protect his minor ward's general welfare was found sufficient in *Parham* to permit the guardian to apply for voluntary admission of his ward to a state psychiatric hospital. 442 U.S. 618-621, 99 S. Ct. 2512-2513. The statutory duties of the guardians who apply for admission of

their adult wards to CHR's residential treatment centers are much more specifically delineated.

Petitioner respectfully submits that the issue presented in this case is of equal importance as the issues addressed in *Parham* and *Institutionalized Juveniles.* Mental retardation is a permanent condition. *Parham* and *Institutionalized Juveniles* addressed the admissions procedures for mentally retarded persons until they reach age 18. The petition at bar requests the Court to address the admissions procedures for the balance of the mentally retarded person's life.

Kentucky, like most states, has invested substantial state and federal funds in the construction of facilities and the development of programs to provide needed services to the mentally retarded. The decision in this case will determine what portion of these resources must be diverted from providing care to the mentally retarded to providing procedures for enabling the mentally retarded to receive that care and treatment.

CONCLUSION

In view of the profound impact this issue presented in this case will have upon: (1) the admissions practices of state residential facilities for the mentally retarded; (2) the mentally retarded persons who reside in those facilities or who could receive beneficial treatment from programs provided by those facilities; (3) the guardians of mentally retarded persons; and (4) the state judicial systems which will otherwise be required to

conduct involuntary hospitalization proceedings for all persons seeking admission to residential treatment facilities and to conduct periodic judicial review of all persons so admitted, petitioner respectfully submits that the petition for writ of certiorari should be granted.

RYAN M. HALLORAN
General Counsel

STANLEY A. STRATFORD

WILLIAM K. MOORE
Cabinet for Human Resources
Office of the Counsel
275 E. Main Street — 4 West
Frankfort, KY 40621
Phone: (502) 564-7900

Counsel for Petitioner

September 30, 1988

APPENDIX

No. 86-6274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL DOE, by his mother and next friend, MARY DOE, - - - *Plaintiff-Appellee,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, - - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed June 15, 1988

Before: KEITH, MILBURN, and NORRIS, Circuit Judges.

KEITH, Circuit Judge. Defendant Elbert Austin, Secretary, Cabinet for Human Resources for the Commonwealth of Kentucky, appeals the order of the district court granting a preliminary injunction and partial summary judgment in favor of plaintiffs, a certified class of mentally retarded persons already involuntarily committed or subject to involuntary commitment to a state-owned mental retardation residential treatment center (RTC) who had challenged the constitutionality of Kentucky's civil commitment scheme as applied to mentally retarded adults.[1]

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[1]Amici John Larry Voyles, Danny Dyer, Brian Shehan, the Parents and Relatives of Oakwood Facility, ICF/MR, Inc. (P.R.O.O.F) and concerned Families of Hazelwood Hospital, ICF/MR, Inc., parents and guardians of profoundly retarded individuals residing at Hazelwood Hospital, ICF/MR, filed a brief urging reversal.

For the following reasons, we AFFIRM in part and REVERSE in part.

Prior to 1986, and at the time that this matter was initiated, Kentucky provided a comprehensive statutory scheme to govern the involuntary civil commitment of the mentally ill, Ken. Rev. Stat. Ann. Chapter 202A (Baldwin 1982), which also governed the commitment of mentally retarded persons. Ken. Rev. Stat. Ann. § 202B.050.

Ken. Rev. Stat. Ann. Chapter 202A *et seq.* provided, in relevant part:

(1) No involuntary commitment would take place unless the person to be committed (a) presented a danger or threat of danger to self or others; (b) could reasonably benefit from treatment; and (c) unless hospitalization represented the least restrictive mode of treatment, Ken. Rev. Stat. Ann. § 202A.026;

(2) Although a staff physician could order an emergency admission, that physician must certify within twenty-four hours that an involuntary admission should occur, and any such emergency admission was limited to seventy-two hours, Ken. Rev. Stat. Ann. § 202A.031;

(3) A preliminary hearing would be held in the district court within six days of the initial detention (or examination, if no emergency admission was sought), and a final hearing would take place within twenty-one days, Ken. Rev. Stat. Ann. § 202A.071;

(4) The preliminary hearing although not required to be formal, would provide an opportunity for the person to be committed to testify, to present witnesses, and to cross-examine witnesses who had testified against her. Ken. Rev. Stat. Ann. § 202A.

076(1). The final hearing would provide the same safeguards; in addition, the rules of criminal procedure would apply, including the duty of the Commonwealth to prove beyond a reasonable doubt that confinement was warranted. Moreover, there was a right to a jury trial unless that right was waived. Ken. Rev. Stat. Ann. § 202A.076(2);

(5) The person to be committed had a right to counsel, Ken. Rev. Stat. Ann. § 202A.121, and a right to be present throughout the proceedings (unless this right was waived, or unless her conduct was unreasonably disruptive), Ken. Rev. Stat. Ann. § 20 2A.131;

(6) Discharge by an authorized staff physician during the prescribed period of involuntary commitment when the criteria for involuntary commitments were no longer met, Ken. Rev. Stat. Ann. § 202A.171;

(7) The opportunity for convalescent leave during the prescribed period of involuntary commitment, Ken. Rev. Stat. Ann. § 202A.181;

(8) A limitation of the prescribed period of confinement to sixty or three hundred sixty days without further judicial proceedings, Ken. Rev. Stat. Ann. § 202A.051.

Ken Rev. Stat. Ann. § 202B.050, before 1986, provided that all rights guaranteed by Ken. Rev. Stat. Ann. Chapters 202A and 210[2] would apply to mentally retarded persons. Section 202B.040 added the additional required determination to § 202A.026 that treatment that could reasonably

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[2]Ken. Rev. Stat. Ann. Chapter 210 *et seq.* codifies the institutional structure of Kentucky's mental health care system; it is not at issue in this appeal.

benefit the individual be available in the hospital or mental retardation residential treatment center. Ken. Rev. Stat. Ann. § 202B.040(4). Furthermore, no mentally retarded person could be involuntarily hospitalized without the consent of the Secretary of the Cabinet for Human Resources, unless a determination of a concurrent mental illness requiring commitment was made pursuant to Chapter 202A. Ken. Rev. Stat. Ann. § 202B.030.

Despite the existence of this comprehensive statutory scheme, the Cabinet for Human Resources formed the Record Review Committee (RRC) for the purpose of controlling admissions to RTCs of mentally retarded persons. The RRC consisted of, at a minimum, a physician, a psychologist, a social worker, and a registered nurse. Procedurally, a parent or guardian was required to contact the local Comprehensive Care Center (operated by the Regional Mental Health-Mental Retardation Board), which would refer the mentally retarded person to the RRC. The written admissions policy of the Cabinet set out standards for admission:

> The suitability for admission to a mental retardation facility is determined by: a) the availability of appropriate alternative residential and training programs in the community, b) the availability of appropriate living and training space within the recommended facility, c) the severity of the applicant's handicap, and d) the status of the family's situation.

("Admissions Policies and Procedures for Mental Retardation Residential Facilities," August 21, 1981).

The RRC procedure accounted for virtually all admissions of mentally retarded persons to RTCs; indeed, during 1982, 1983, 1984 and 1985, only one mentally retarded person was admitted pursuant to the statutory procedures for involuntary commitment. However, the Cabinet's view has

consistently been that admissions under the RRC procedure, initiated by the parent or guardian, are voluntary in nature. Moreover, if the committed person was able to sign the Resident's Bill of Rights form which was presented at admission, by signature or by marking an "X," her admission was considered to be voluntary.

Once a person was admitted, his or her continued commitment was ostensibly evaluated according to the Mental Retardation Facility Discharge Protocol, based on Ken. Rev. Stat. Ann. § 210.270. That section provides a mechanism for community placements once the RTC staff determines that such placement is appropriate, including provisions for challenges to reclassification.[3]

The named plaintiff, Samuel Doe, was placed in 1971, at age eighteen, in the custody of what is now the Kentucky Cabinet for Human Resources. Under the authority of the Secretary of the Cabinet, he was institutionalized in the Outwood State Hospital, Dawson Springs, Kentucky. In 1977, while still at Outwood, he was adjudicated as incompetent at the initiation of the Commonwealth. Soon thereafter, his mother was appointed as his legal guardian. Doe has received no independent review of his confinement, judicial or otherwise, throughout the seventeen years of his institutionalization.

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 challenging the failure of Kentucky to provide the safeguards required by Ken. Rev. Stat. Ann. Chapters 202A and 202B. In its first memorandum opinion, the district court found that defendants had adopted a policy af allowing parents to exert an absolute veto over the decision to

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[3]Additionally, the Cabinet had adopted a policy which allowed parents an absolute veto over the decision to place their mentally ill children in community placements. This policy was held to be unconstitutional in the district court's first opinion, and it not at issue in this appeal.

release a patient to a community placement, and that such a practice was contrary to the holding of the Supreme Court in *Parham v. J.R.*, 442 U.S. 584 (1979). Memorandum Opinion of March, 28, 1984 (Memorandum I) at 13-17. The district court denied summary judgment in all other respects.

In its second memorandum opinion, the district court noted that because the great majority of profoundly and severely mentally retarded persons are incapable of making the decision as to whether admission into a RTC is in their best interest, all such admissions were to be considered involuntary. Memorandum Opinion of January 9, 1986 at 3, 9 (Memorandum II). It then concluded that, because Kentucky had declared that the mentally ill and the mentally retarded would be treated in the same manner, it constituted a denial of equal protection to apply the involuntary commitment statute to the mentally ill while refusing to make its provisions available to the mentally retarded. Memorandum II at 5-8.

In response to the district court's order, the Kentucky General Assembly amended Chapter 202B in an attempt to avoid the result reached by the district court. Ken. Rev. Stat. Ann. § 202B.050 was amended to read:

> All rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Ken. Rev. Stat. Ann. § 202B.050 (Baldwin 1986). Moreover, Ken. Rev. Stat. Ann. § 202B.040, listing the requirements for admission, was amended to include a fifth subsection:

> When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:

(1) He is a mentally retarded person:

(2) He presents a danger or a threat of danger to self or others;

(3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;

(4) Treatment that can reasonably benefit the individual in the hospital or mental retardation residential treatment center; and

(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family members' application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provisions of K.R.S. Chapter 202B.

Ken. Rev. Stat. Ann. § 202B.040 (1986). The effect of this amendment was to define most admissions as technically "voluntary," without reference to the actual or independent wishes of the person to be committed.

Finally, a new section, Ken. Rev. Stat. Ann. § 202B.045 (1986), codified new requirements for admission and discharge:

(1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment:

(b) The interdisciplinary team shall:

1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall: (a) Offer counseling to parents or guardians who re-

> quest the release of a resident concerning the advantages and disadvantages of the release; (b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and (c) Prepare and place in the resident's record a summary of findings, progress, and plans.

The "interdisciplinary team" was defined as:

> the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker, and other professionals, at least one (1) of whom is a qualified mental health professional, and many include the resident, the resident's family, or the guardian.

Ken. Rev. Stat. Ann. § 202B.010(1) (1986). As the district court noted, "[t]he 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment." Memorandum Opinion of November 20, 1986 (Memorandum III).

Plaintiffs moved for a summary judgment declaring HB 477 unconstitutional, while defendant moved for reconsideration of the district court's opinion and partial summary judgment of January 9, 1986. On November 20, 1986, the district court (a) reconsidered its previous holding that Kentucky's commitment procedures conformed with due process, and held that due process required a judicial hearing prior to commitment; (b) found that Kentucky could not define applications by parents or guardians for placement as "voluntary," Ken. Rev. Stat. Ann. § 202B.-

040(5) (1986); and (c) reaffirmed that equal protection required a judicial hearing. Defendant appeals.

II.

Involuntary civil commitment to a mental institution represents "a massive curtailment of liberty," requiring due process protection. *Vitek* v. *Jones*, 445 U.S. 480, 491-92 (1980); *Humphrey* v. *Cady*, 405 U. S. 504, 509 (1972). Indeed, the liberty deprivation resulting from involuntary commitment is more than a loss of mere physical freedom; the stigma which attaches upon entry to a mental health facility can have a profound impact upon individual liberty. *Addington* v. *Texas*, 441 U.S. 418, 425-26 (1979).

The Commonwealth does not contend that it may confine persons thought to be mentally retarded without providing any degree of due process. Instead, the Commonwealth argues that: (A) the named plaintiff does not have standing to pursue the class action because his confinement is, in fact, voluntary; and (B) the due process requirement is satisfied by an administrative procedure such as the one now provided by the Commonwealth, rather than requiring a judicial officer.

A.

As stated above, appellant's argument that Samuel Doe lacks standing to challenge the legality of his confinement depends on the voluntariness of both his initial and continued commitment. If, as appellant contends, Doe entered the RTC voluntarily, and remains voluntarily, he would not present a controversy for adjudication.

However, we note that appellant has a view of "voluntary" behavior which is, to say the least, expansive. By legislative fiat, the Commonwealth has deemed admissions initiated by a parent or guardian to be voluntary, with no regard for the actual wishes of the committed person. Ken.

Rev. Stat. Ann. § 202B.040(5) (1986). In fact, as stated by the district court:

> As noted by this Court in *Kentucky Ass'n for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233 (1980), *aff'd* 674 F. 2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982), many retarded adults are placed in [RTCs] by state appointed guardians who have no family ties with the mentally retarded person, and, even in those cases where the mentally retarded person is sought to be placed in an [RTC] by a relative or person who is also his legal guardian, the label of "voluntary commitment" cannot stand up in the face of the fact that the mentally retarded person is being committed without his or her consent. *Conn, supra*, 510 F. Supp. at 1248-49.

Memorandum Opinion at 6.

We recognize that the Supreme Court has, at least implicitly, viewed the commitment of a minor to a mental facility by a parent or guardian, subject to review by a neutral factfinder, as a voluntary admission. *Parham* v. *J.R.*, 442 U.S. 524 (1979); *Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979). However, as we discuss more fully in Section IIB, *infra*, minor children simply do not stand in the same position as adults with their parents. The traditional interrelationship of interests shared by parents and their minor children is not as presumptive as the minor passes from childhood to adulthood.

Likewise, the notion that the continuing confinement of the class members is voluntary notwithstanding the possible involuntariness of their initial confinement is, at best, an illusion. Indeed, the practice of relying upon some affirmative act on the part of profoundly and severely retarded persons to signal their will to escape confinement,

coupled with the presence of a parent or guardian who may have played a pivotal role in institutionalizing the admittee in the first instance, creates a quite palpable danger that the adult child will be "lost in the shuffle." Cf. *Parham,* 442 U.S. at 619. We decline to adopt a measure of voluntariness for the commitment of adults that favors form over substance.[4] Therefore, we agree with the district court that the commitment of mentally retarded adults by the Commonwealth upon application by a parent or guardian is to be considered involuntary.[5]

B.

The district court, relying upon the analysis of *Clark* v. *Cohen,* 613 F. Supp. 684 (M.D. Pa. 1985), *aff'd,* 794 F. 2d 79, *cert. denied,* 107 S. Ct. 459 (1986) (and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pennsylvania,* 325 F. Supp. 966 (M.D. Pa. 1971)), held that it would be a violation of due process for the Commonwealth to involuntarily commit a mentally retarded adult without a

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[4]For the same reasons, we cannot conclude, as amici argue, that the due process protections which are a part of the formal guardianship hearing, KRS 387.500 *et seq.*, vitiate the need for a hearing at the time of commitment. Moreover, the drastic curtailment of liberty which physical commitment represents makes a guardianship proceeding, which may have occurred at some time long before the actual confinement, a poor substitute for a contemporaneous hearing.

[5]Of course, because these admissions are involuntary, a determination must be made pursuant to § 202B.040 that the admittee presents a danger or a threat of danger to self or others, that confinement in a hospital or RTC represents the least restrictive alternative mode of treatment, and that reasonably beneficial treatment is in fact available at a hospital or RTC. The statute, while not explicit, seems to contemplate that the interdisciplinary committee would make such a determination.

prior *judicial* hearing. Memorandum Opinion at 4. On appeal, the Commonwealth argues that the due process claim asserted by appellees is controlled by *Parham, supra.*

In *Parham,* the Supreme Court held that the admission of minors to state mental health facilities by their parents was constitutional so long as an "inquiry [was] made by a 'neutral factfinder' to determine whether the statutory requirements for admission [were] satisfied." 442 U.S. at 606. The court found that a formal or informal hearing was not required, and explicitly endorsed the use of informal, traditional medical investigative techniques. 442 U.S. at 607. However, we do not view *Parham* as controlling. The Court in *Parham* was concerned with the commitment of minor children, and its conclusions flow more or less naturally from the unique and traditional relationship shared between parent and child. 442 U.S. at 602-03; *Clark* v. *Cohen,* 613 F. Supp. at 699. "Once someone becomes an adult, one's parents lose that degree of authority found so crucial *in Parham.*" *Clark,* 613 F. Supp. at 699. Moreover, the interest of the parents in avoiding "significant intrusion into the parent-child relationship." at noted in *Parham,* 442 U.S. at 610, is simply not as great in the case of an adult.

We recognize that the decision to commit a person because of mental retardation is, to a large degree, medical in nature. As noted on *Parham,* "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." 442 U.S. at 607. However, "[t]he medical nature of the inquiry . . . does not justify dispensing with due process requirements. It is precisely the subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings." *Vitek* v. *Jones,* 445 U.S. at 495. Although dispensing with an adversary proceeding may be justified in the case

of a child, we cannot conclude that adults stand in the same position.

However, we also cannot agree with the conclusion of the district court that, because *Parham* is not controlling, due process requires that adults who are involuntarily committed are entitled to a *judicial* hearing. Although, as a matter of policy, precommitment review by a judicial officer would ensure the most vigorous protection of the mentally retarded, and thus, might be preferable, it has been noted in a variety of situations that due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer. *Parham,* 442 U.S. at 607; *Morrissey* v. *Brewer,* 408 U.S. 471, 489 (1972) (parole revocation hearing); *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970) (hearing prior to termination of AFDC benefits).

In identifying those procedures which are required to ensure due process, we are guided by the Supreme Court's opinion in *Vitek* v. *Jones,* 445 U.S. 480 (1980). In *Vitek,* a convicted felon was transferred from a state prison to a mental facility under a state statute which allowed the Director of Correctional Services to effectuate such a transfer upon a finding by a designated physician or psychiatrist that a prisoner "suffers from a mental disease or defect" and "cannot be given proper treatment" in the prison itself. 445 U.S. at 483-4. In affirming the district court's holding that the statute, as applied to the prisoner, deprived him of due process, the Supreme Court approved the district court's requirement of the following minimum procedures:

1. Written notice to the prisoner that a transfer to a mental hospital is being considered;
2. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be

heard in person and to present documentary evidence is given;

3. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the State;
4. An independent decisionmaker;[6]
5. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
6. Qualified and independent assistance must be provided to the inmate.

445 U.S. at 494-5.

Without question, due process requires that mentally retarded adults in Kentucky receive, at a minimum, the procedural safeguards listed above. If these basic safeguards are required before an inmate is transferred from a prison to a mental hospital, surely a person thought to be mentally retarded must be afforded at least the same level of protection before being removed from an ostensibly unfettered existence in society to the confines of an institution. *See Morris, The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment,* 60 Tul. L. Rev. 927, 942 (1986).

Under the current statutory procedure for the involuntary commitment of adults in Kentucky, however, there is no formal mechanism for providing notice, and no method of assuring that the adequacy of notice is related to the time which the potential admittee would require to prepare for the hearing. There is no procedure whereby the admittee may present witnesses or documentary evidence, nor is

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[6]Moreover, the independent decisionmaker must have the authority to implement its decision. *See Parham,* 442 U.S. at 607; *Clark* v. *Cohen,* 794 F. 2d at 86.

there a clear opportunity for cross-examination. No independent assistance is allowed by the statute.[7] Moreover the parent or guardian of the person to be committed is allowed to be a member of the interdisciplinary team, which poses a serious threat to impartiality. Ken. Rev. Stat. Ann. § 202B. 010(1) (1986). Therefore, although we do not conclude that a judicial hearing is required, we agree with the district court's conclusion that the current procedure does not conform with due process.

III.

The Equal Protection Clause of the Fourteenth Amendment requires "that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). If a state enacts legislation which treats different classes of people differently, the classification drawn by the statute must be rationally related to a legitimate state purpose, 473 U.S. at 440. The district court held that the denial of a judicial hearing deprived appellees of equal protection under the laws. We agree.

The Commonwealth has not demonstrated that it has any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment. We recognize that, as a matter of fact, there are differences between the mentally ill and the mentally retarded. *See Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977). However,

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[7]The statute anticipates that the parent or guardian would participate in the process; however, such assistance could hardly be deemed to be independent. *See Lessard* v. *Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 743, *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976).

the mere identification of differences is not enough; equal protection "require[s] that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

The Commonwealth identifies two interests which it argues are served by the distinction it draws between the mentally ill and the mentally retarded: (1) an interest in not imposing unnecessary procedural obstacles which might prohibit legal guardians from seeking available services for their mentally retarded wards; and (2) its interest in prioritizing diagnostic and service resources to the mentally retarded as soon as possible instead of expending resources in time-consuming procedures prior to admission. However, surely these interests apply to the mentally *ill* as well; the Commonwealth cannot show that the *distinction* which is drawn is rationally related to its stated purposes. *Baxstrom*, 383 U.S. at 111-12; *see Jackson v. Indiana*, 406 U.S. 715, 724 (1972). Therefore, we agreed with the district court that equal protection requires the Commonwealth to provide a judicial hearing to appellees, either upon admission, or, if now committed, when they reach adulthood.

IV.

Appellants further argue that the district court erred in holding that periodic judicial review over the course of commitment was required by equal protection. Appellees, in response, interpret the opinion below as holding that the requirements of equal protection *and* due process mandated periodic judicial review. However, one could conclude from a fair reading of the Memorandum Opinion that the district court did not in fact rule on this issue. After a discussion of the difference between the prospects of recovery for the mentally ill and the mentally retarded, and after noting that "this fundamental difference seems to indicate that the state could prescribe different modes of due process for the re-

view of the commitment of severely and profoundly mentally retarded adults versus the review of the commitment of mentally ill adults," Memorandum III at 8-9, it goes on to conclude:

> However, it is not our duty to spell out at this juncture what such due process procedures might be, and we have not yet been cited to any statute or decision which the parties contend controls the review rights of the mentally retarded adults.
>
> Our only function at this time is to hold that there must be some judicial review, at some appropriate time, of the commitment of persons who are eighteen years or older and who are mentally retarded. Suffice to say that the statute, as it now stands, is unconstitutional with respect to the right to a judicial hearing of mentally retarded adults prior to their involuntary commitment. *Clark v. Cohen,* 613 F. Supp. 684 (M.D. Pa. 1985).

Memorandum III at 9.

A fair reading of this section of the opinion would seem to indicate that the phrase "judicial review" in the above quote refers to the district court's conclusion that due process and equal protection, require that, at *some* point, a judicial determination must be made. It is not at all clear that the district court held that due process or equal protection required *periodic* judicial review; indeed, given the fact that the district court recognized that legitimate and relevant factors distinguished the mentally ill and the mentally retarded concerning the efficacy of treatment once they were committed, it at least seems unlikely that appellant's interpretation is correct. However, because both parties have concluded, through their respective interpretations, that there was a holding on this issue, and because both interpretations are at least conceivable from a reading

of the Memorandum Opinion, we shall discuss whether due process or equal protection requires periodic judicial review.[8]

A.

Our discussion of judicial hearings at admission as a requirement of due process, Section IIB, *supra,* is applicable to our analysis here. If one has no due process right to a judicial hearing before one is initially committed, logic dictates that no such right exists during the period of confinement. Of course, because involuntary confinement cannot continue after the basis for that confinement ceases to exist, due process requires that *some* periodic review take place during confinement. *See O'Connor v. Donaldson,* 422 U.S. 563, 574-75 (1975). However, as in the case of the initial admission, we cannot say that due process requires a periodic *judicial* review.

B.

As the district court noted, for purposes of equal protection analysis of the requirement for periodic review, "it is recognized that mentally ill persons may recover from their mental illnesses within relatively short periods after their . . . commitment, whereas severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition." Memorandum at 8-9. Thus, there may be constitutionally valid reasons for providing different methods of periodic review for the mentally retarded and the mentally ill. However, we see no legitimate interest of the Commonwealth which would justify denying the mentally retarded periodic judicial

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[8]Also, there is little point in reserving the issue for another day, as it is a virtual certainty that this court shall be required to address it at some juncture.

review while providing the same to the mentally ill. Therefore, the Commonwealth must make a judicial review procedure available to the mentally retarded.[9]

V.

Therefore, for the foregoing reasons, we REVERSE the judgment of the district court inasmuch as it mandates a judicial hearing prior to commitment and periodic judicial review as requirements of due process, and REMAND this issue to the district court to allow it an opportunity to revise the grant of partial summary judgment in a manner consistent with this opinion. In all other respects, the judgment below is AFFIRMED.

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[9]The task of resolving how that procedure may differ from that provided to the mentally ill is one best left to the district court, as it will have the benefit of plans submitted by the parties, and can make findings of fact concerning the relative prognoses of the mentally retarded and the mentally ill.

No. 86-6274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL DOE, by his mother and next friend, MARY DOE, - - - *Plaintiff-Appellee,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, - - - *Defendant-Appellant.*

ORDER — Filed August 3, 1988

BEFORE: KEITH, MILBURN and NORRIS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0738-L(A)

SAMUEL DOE, et al., - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, - - - - *Defendant.*

MEMORANDUM OPINION

This action is presented to the Court on the motion of the plaintiff for preliminary injunction and summary judgment, and on the motion of the Defendant for the Court to reconsider its opinion and partial summary judgment of January 9, 1986.

Since the opinion of January 9, 1986 was rendered, the Kentucky legislature amended K.R.S. Chapter 202B dealing with the commitment of mentally retarded persons. 1986 Ky. Acts ch. 79 (HB 477) at pp. 162-63. These amendments became effective on March 6, 1986 when approved by the Governor. Prior to the enactment of the amendments, the statute provided that "[a]ll rights guaranteed by K.R.S. Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." K.R.S. 202B.-050 (1982). These rights included the procedural due process right to a preliminary and final judicial hearing in a district court of the Commonwealth of Kentucky to determine whether the mentally retarded individual should involuntarily be hospitalized in accordance with the ap-

plicable statutory criteria. K.R.S. 202A.051 and K.R.S. 202B.040 (1982).

The 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment. K.R.S. 202B.050, as amended, reads as follows:

> All rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons. *Id.*

Furthermore, a new subsection (5) was added to K.R.S. 202B.040 (1986), which now reads as follows:

> When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:
>
> (1) He is a mentally retarded person;
>
> (2) He presents a danger or a threat of danger to self or others;
>
> (3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;
>
> (4) Treatment that can reasonably benefit the individual is available in the hospital or mental retardation residential treatment center; and
>
> (5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provisions of K.R.S. Chapter 202B.

Thus, the statute now contemplates that many, if not most, commitments of the mentally retarded shall not even be considered involuntary. A new section, K.R.S. 202B.045 (1986), spells out the requirements for admission and discharge:

(1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;

(b) The interdisciplinary team shall:

(1) Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property

and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:

(a) Offer counseling to parents or guardians who request the release of a resident concerning the advantage and disadvantages of the release;

(b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and

(c) Prepare and place in the resident's record a summary of findings, progress, and plans.

Finally, the amendments define the "interdisciplinary team" as:

the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker, and other professionals, at least one (1) of whom is a qualified mental health professional, and may include the resident, the resident's family, or the guardian.

It will be recalled that, with regard to the statutory scheme in effect from 1982 uutil 1986, the previous opinion of the Court held that because it granted equal due process rights prior to involuntary commitment to both mentally retarded and mentally ill persons, the Commonwealth could

not apply the statutes in a different way to these two classes of persons and thereby deprive the mentally retarded of their equal protection rights. That decision also held that it could not be a violation of the due process rights of mentally retarded persons for the state to commit such persons to mentally retarded institutions (hereinafter MRI) without a judicial hearing.

The Court, in that portion of the opinion relating to due process, relied heavily upon the decision of the Supreme Court in *Parham* v. *J.R.*, 442 U.S. 584 (1979). However, we have re-examined the case of *Clark* v. *Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985) and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pa.*, 325 F. Supp. 966 (M.D. Pa. 1971), and now reach the contrary conclusion that it would be a violation of due process for Kentucky to involuntarily commit a mentally retarded person who is eighteen years of age or over without first awarding him a judicial hearing. Our opinion in this regard is strengthened by the very thorough analysis which District Judge Huyett undertook in *Clark* v. *Cohen, supra*, to show that there are indeed significant differences between the due process rights of adult mentally retarded persons and the rights of juveniles in a similar position. *Id.*, 613 F. Supp. at 697 *et seq.* As Judge Huyett noted,

> *Parham* dealt only with the commitment of minors by their parents or legal guardians. The Court's decision rested very heavily on the assumption that both parents and guardians act in the best interests of the child and that both have traditional authority over the raising of minors in their care. This aspect of *Parham* makes it inapposite to a situation involving someone who is not a minor. Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*. Moreover, as even the *Parham*

> court found, there is a possibility (born[e] out by this case) that a 'ward' of the state who is committed may become 'lost in the shuffle.' *Id.* at 699, *citing Parham,* 442 U.S. at 619.

While an involuntary commitment to an MRI may be the most humane solution for a profoundly or severely retarded mentally retarded person who is unable to care for him or herself, it is still apparent that such commitment results in an extreme curtailment of personal liberty. Any decision by the state which results in such a profound deprivation of personal liberty must be accompanied by substantial due process safeguards, particularly where the person who is to be committed may be lacking in the ability to fully protect his or her procedural rights. We therefore hold that mentally retarded persons over eighteen years of age are entitled to a judicial hearing and determination of the propriety of commitment, either prior to being involuntarily committed to an MRI or other facility, or as soon as practicable thereafter.

This holding applies equally to persons who are sought to be committed for the first time after they are eighteen and those who have been in the MRI prior to reaching eighteen but who then reach the age of eighteen. Of course, the state has the right to commit minors under the procedures that are now available under the statute and under the decision in *Parham.*

We also disagree with the statute's definition of what constitutes an "involuntary commitment." K.R.S. 202B.-040(5) treats the application by parents or guardians for placement of their retarded family member or ward in any mental retardation center as voluntary, and thereby strips the mentally retarded adult of his or her right to a *judicial* hearing and determination prior to commitment. As noted by this Court in *Kentucky Ass'n for Retarded Citizens* v.

Conn., 510 F. Supp. 1233 (1980), *aff'd* 674 F. 2d 582 (6th Cir.), *cert. denied* 459 U. S. 1041 (1982), many retarded adults are placed in MRI's by state appointed guardians who have no family ties with the mentally retarded person, and, even in those cases where the mentally retarded person is sought to be placed in an MRI by a relative or person who is also his legal guardian, the label of "voluntary commitment" cannot stand up in the face of the fact that the mentally retarded person is being committed without his or her consent. *Conn, supra,* 510 F. Supp. at 1248-49.

With regard to the equal protection argument, it is true that courts have stated that there are significant differences between the mentally ill and the mentally retarded. *See Kremens* v. *Bartley,* 431 U.S. 119, 135-36 (1977). However, the fact that there are significant differences between the mentally ill and the mentally retarded does not ease the principle that mentally ill persons and mentally retarded persons are in similar positions: each has a fundamental constitutional right not to be placed in an institution until a judicial hearing has taken place, and appropriate findings have been made that they pose a danger, or threat of danger, to self or others, and have met the other requirements set out in the statutes. *See* K.R.S. 202B.040 (mentally retarded); K.R.S. 202A.026 (mentally ill).

The statute, K.R.S. 202B, specifically requires that where a person who is alleged to be mentally retarded is involuntarily committed, the following determination shall be made: that he is mentally retarded, presents a danger or threat of danger to himself or others; that the least restrictive alternative mode of treatment is in a hospital or mental retardation residence treatment center; and that treatment that can reasonably benefit the individual is available in the hospital or mental retardation treatment center. K.R.S. 202B.040 (1986). The statute, however, does not

explicitly prescribe who makes the ultimate determination as to whether these criteria have been met. It does provide that patients shall be admitted only on the approval of a physician. K.R.S. 202B.045(1)(a). It also requires evaluation by the interdisciplinary team. K.R.S. 202B.010(1) and 202B.045. The statute, as amended, apparently even retains the requirements that the Secretary consent to the mentally retarded individual's commitment. K.R.S. 202B.-030. However, the statute no longer grants mentally retarded persons the right, granted to mentally ill persons under K.R.S. 202A.051, of having a judicial determination made as to the propriety of their involuntary commitment. *See* K.R.S. 202B.050 (1986). K.R.S. 202B therefore violates the equal protection clause because there is no rational basis for distinguishing between the mentally retarded and the mentally ill with regard to their initial involuntary confinement. Both categories of persons who are eighteen years of age or over must receive a judicial hearing.

We next come to the question of what significance the difference between mentally retarded and mentally ill persons entails insofar as it affects their right to periodic review of their commitment. The present law grants the mentally ill person the right of judicial review at least every 360 days after he or she has reached adulthood because he or she cannot be committed for a longer period. K.R.S. 202A.051 (1986). However, the present law does not grant the mentally retarded person judicial review of his or her indefinite commitment. In this connection, it is recognized that mentally ill persons may recover from their mental illnesses within relatively short periods after their judicial commitment, whereas severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition. This fundamental difference seems to indicate that the state could prescribe

different modes of due process for the review of the commitment of severely and profoundly mentally retarded adults versus the review of the commitment of mentally ill adults. However, it is not our duty to spell out at the juncture what such due process procedures might be, and we have not yet been cited to any statute or decision which the parties contend controls the review rights of the mentally retarded adults.

Our only function at this time is to hold that there must be some judicial review, at some appropriate time, of the commitment of persons who are eighteen years or older and who are mentally retarded. Suffice it to say that the statute, as it now stands, is unconstitutional with respect to the right to a judicial hearing of mentally retarded adults prior to their involuntary commitment. *Clark* v. *Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985).

We have this day entered a preliminary injunction and partial summary judgment in accordance with our opinion.
Dated 11-20-86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0738-L(A)

SAMUEL DOE, et al., - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, - - - - - *Defendant.*

PRELIMINARY INJUNCTION AND PARTIAL SUMMARY JUDGMENT

Plaintiffs having moved for a preliminary injunction and summary judgment, and defendant having moved the Court to reconsider its opinion and partial summary judgment of January 9, 1986, and the parties having fully briefed the issues, and the Court being of the opinion that a hearing is unnecessary on the motion for a preliminary injuction,

IT IS ORDERED AND ADJUDGED as follows:

1. Defendants are enjoined from committing to a mentally retarded treatment center, or any other facility for treatment of the mentally retarded, any allegedly mentally retarded person who is over eighteen years of age without first granting him or her a judicial hearing to determine whether or not he or she should be committed under the standards set out in K.R.S. 202B.040(1-4). Defendants are likewise enjoined from continuing to confine any allegedly mentally retarded person in any such institution after he or she has reached his or her eighteenth birthday, unless there

is a judicial hearing and a judicial determination made that the standards set out in K.R.S. 202B.040(1-4) have been met. Such judicial hearing shall take place not later than three months after the person already committed has reached the age of eighteen years. The confined mentally retarded person referred to in the preceding two sentences may continue to be confined between the time such person attains the age of eighteen years and the time he or she receives the required judicial hearing. Plaintiffs shall give security in the amount of $100.00. Rule 65(c), Fed. R. Civ. Pro.

2. Plaintiffs are further granted partial summary judgment on the issue of the unconstitutionality of K.R.S. Chapter 202B, as amended, such statute being in violation of the due process and equal protection rights of the Plaintiff as set forth in the accompanying memorandum opinion.

3. The parties shall have sixty (60) days from the date of this order in which to meet and confer for the purpose of submitting to the Court an agreed compliance plan for the provision of judicial proceedings in accordance with the opinion entered this day.

Dated 11-20-86

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0738-L(A)

SAMUEL DOE, et al., - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, et al., - - - *Defendants.*

MEMORANDUM OPINION

This action is submitted to the Court on the plaintiffs' motion for reconsideration pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Plaintiffs seek reconsideration of that portion of this Court's March 28, 1984, memorandum opinion and order which denied plaintiffs' claims regarding the admissions process to Mental Retardation Residential Treatment Centers [hereinafter "MRRTC"]. More specifically, plaintiffs' motion requests the Court to make available to the mentally retarded the procedural protections established for them by state statute. Defendants, on the other hand, move for partial summary judgment in their favor on the same issue.

The record reveals that approximately 800 mentally retarded persons are confined in MRRTCs. Of these 800 persons, 100 are moderately or mildly retarded, 222 are severely retarded, and 487 are profoundly retarded. Plaintiff, Samuel Doe, was placed at the Outwood State Hospital at the age of eighteen under the authority, care and custody of the Secretary of the Kentucky Cabinet

[formerly "Department"] for Human Resources. Several years after he had become a resident, he was adjudicated incompetent in 1976 at the initiation of the state. Soon thereafter, his mother, Mary Doe, was appointed legal guardian. He now has been subjected to confinement for over thirteen years.

The record also reveals that the criteria for admission to a mental retardation facility is determined by (a) the availability of appropriate alternate residence and training programs in the community, (b) the availability af appropriate living and training space within the recommended section, (c) the severity of the applicant's handicap, and (d) the status of the family situation. In addition, it is the custom of the defendants to consider an admission voluntary if the retarded person signs what is known as a bill of rights form. The record reveals that if the retarded person is unable to understand the procedures of admission, the procedure is explained to the family accompanying him. If the family agrees to it, and if the individual signs the application with an x or is able in any other way to let the defendants know whether he or she wants to be admitted, then that individual is considered a voluntary admission.

The record further reveals that no civil proceedings with regard to admissions have been instituted. The defendants consider this appropriate because they believe that nearly all admissions are voluntary rather than involuntary. The record also reveals that only two court proceedings have taken place with reference to a resident's request for release.

The plaintiffs' brief in support of reconsideration points out that this Court, in effect, previously focused erroneously on the constitutionality of the defendants' informal admission system rather than on the constitutionality of the class members' exclusion from the statutory system provided by KRS 202B. Plaintiffs emphasize that they are not

challenging the constitutionality of KRS 202A or 202B, but rather, are challenging the rights of the state under due process and equal protection considerations. Likewise, plaintiffs correctly note that in *Kentucky Association for Retarded Citizens* v. *Conn,* 510 F. Supp. 1233 (W.D. Ky. 1980), *aff'd* 674 F. 2d 582 (6th Cir.), *cert. denied,* 459 U.S. 1041 (1982), this Court held that the great majority of profoundly and severely mentally retarded persons are simply incapable of making decisions as to whether it is in their best interest to be placed in a MRRTC.

In light of the holdings in *Parham* v. *J.R.,* 442 U.S. 584 (1979), and *Secretary of Public Health of Pennsylvania* v. *Institutionalized Juveniles,* 442 U.S. 640 (1979), we have little doubt that the state may constitutionally provide for the admission of mentally retarded persons, at least with respect to minority patients, the informal procedures which are now used by the state in admitting nearly all patients. However, in the instant case, the Commonwealth of Kentucky did not choose to legislate for procedures similar to those discussed in *Parham* and *Institutionalized Juveniles.* Instead, the legislature chose to guarantee to mentally retarded persons all of the rights guaranteed to mentally ill persons by KRS 202A and 210. Having created these due process rights, the question is whether the state may deny them by resorting to practices and procedures which are not in accord with the practices and procdures afforded to mentally ill persons.

As previously mentioned, plaintiffs are attacking the defendants' informal procedures as a violation of due process and equal protection. With respect to due process, plaintiffs rely, *inter alia,* on *Cleveland Board of Education* v. *Loudermill,* 105 S. Ct. 1487 (1985), *Mills* v. *Rogers,* 457 U.S. 291 (1982), and *Vitek* v. *Jones,* 445 U.S. 480 (1980), as well as this Court's opinion in *Karc,* for the proposition that once the mentally retarded have a liberty interest

created by the state, the state cannot extinguish it by failing to follow its own legislative due process procedures. While this Court believes that the plaintiffs have been granted a liberty interest by KRS 202A and 202B as well as by the holdings in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), *Vitek* v. *Jones*, *Karc*, and *Association for Retarded Citizens* v. *Olson*, 561 F. Supp. 473 (D. N.D. 1982), none of the Plaintiffs' cases on due process issue reached the result contended for by the plaintiffs, viz., what due process should be extended to the plaintiffs once a court has reached the conclusion that they possess a state created liberty interest.

In *Vitek* v. *Jones*, although the Court approved of the specific due process procedures set out by the district court, it did not in any way state that these procedures were the same as those set out for non-prisoners who were involuntarily confined to a mental hospital. In *Loudermill*, the Court stated that "once it is determined that the Due Process Clause applies, 'the question remains what process is due.'" 105 S. Ct. at 1493 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). The answer to that question, according to the Court, was "not to be found in the Ohio statute." *Id.*

In conclusion, we believe that although a liberty interest is created in the plaintiffs with regard to so-called voluntary admissions, the procedures followed by the state are sufficiently analogous to those followed in *Parham* and *Institutionalized Juveniles* to meet the requirements of procedural due process.

Although the plaintiffs cannot prevail upon the due process issue, they do prevail upon the equal protection issue. Kentucky has explicitly provided that mentally retarded persons shall have the same due process rights as mentally ill persons. In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), a prisoner named Baxstrom was certified as insane by a prison physician and transferred to a prison mental

hospital. Later, when his penal sentence was about to expire, the State of New York civilly committed him following a proceeding in the chambers of a Surrogate, at which Baxstrom appeared alone. Medical certificates were filed by the state and indicated that two examining physicians believed Baxstrom was still mentally ill and in need of institutional care. The Surrogate signed a certificate which indicated he was satisfied that Baxstrom would require care and treatment in an institution for the mentally ill. Following that hearing, Baxstrom was retained at the state prison mental institution.

Under New York law, all persons civilly committed because of mental illness were granted to right to a jury trial, except those who were committed at the expiration of a penal term. The Supreme Court held that Baxstrom's equal protection rights were violated because all persons who were mentally ill should have been granted the right to a jury trial and no rational basis existed for distinguishing between persons who had been confined in prison and those who had not been so confined. The Court also held that the state did not have the right to deny Baxstrom a judicial proceeding to determine whether he was dangerous and should be confined in a prison rather than in a civil mental institution.

In *Jackson* v. *Indiana*, 406 U.S. 715 (1972), Jackson was a mentally defective person who had been charged with two robberies. After a competency hearing was held by the court to determine whether Jackson could stand trial, the court ordered him committed to the Department of Mental Health until such time as the department would certify that he was sane.

The Supreme Court held that Jackson was deprived of equal protection because the Indiana statutes for commitment of mentally ill or "feeble-minded" persons afforded protections which were not available or granted to Jackson

when he was committed under Indiana's pretrial commitment statute for incompetent criminal defendants. Under this statute, a court could find that a person was incompetent to stand trial and therefore should be confined to a mental institution without any statutory provision for periodic review of the defendant's condition or opportunity for release. In the words of the Court, "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release that those generally applicable to all others not charged with offenses, and by condemning him to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by [Indiana's other two commitment statutes], Indiana deprived [Jackson] of equal protection of the laws under the Fourteenth Amendment." *Id.* at 730.

Here Kentucky has decreed by legislative fiat that the mentally ill and the mentally retarded are to be treated alike with minor exceptions. Having declared that they shall be treated in the same manner, we believe that it is a violation of equal protection for the defendants to treat them differently.

The problem in the case at bar is created primarily by the legislature's sweeping determination in KRS 202B.050, which states that "[a]ll rights guaranteed by KRS Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." With this provision in mind, we must examine the provisions of KRS 202A and compare them with the practices and procedures of the defendants in construing Chapter 202B.

KRS 202A.021 provides that an authorized staff physician may admit for observation, diagnosis, care and treatment any person who is mentally ill or who has symptoms of mental illness and who applies voluntarily therefor. The practice followed by the defendants allows voluntary admissions for mentally retarded persons as previously

outlined. These procedures are analogous to the procedures which the state defendants follow in admitting mentally retarded persons whom they contend are voluntarily committed. Also, the provisions contained in KRS 202A.-021(1) allow children under eighteen who are mentally ill or who have symptoms of mental illness to be admitted provided the child's parents or guardian apply for admission and sign the application in the presence of two witnesses. A child fourteen years of age or older may admit himself or herself to a hospital for evaluation with the consent of a treating or admitting physician, provided that the child's parents or legal guardian are notified immediately of the admission and of their right to seek discharge.

We believe that insofar as mentally retarded persons under eighteen years of age are concerned, they are granted substantially the same rights by the defendants in the practices and procedures which they now follow. In other words, they are admitted upon the application of their parents or guardian and upon the recommendation of the Records Review Committee, which includes at least one psychiatrist.

We also believe that the defendants may admit mentally retarded person who are mildly or moderately retarded and who are over eighteen where those persons in their individual capacities make an application to be admitted to a mental retardation facility, but not in those instances where the application is made by parents, guardians, committee or at the instance of the state.

Finally, we believe that as to those persons who are profoundly or severely retarded and who are over the age of eighteen, the state defendants may not follow the procedures now used. Those persons must be considered as involuntarily committed even though the procedure now followed is called a voluntary admission and even though the so-called voluntary admittee signs the form prescribed

by the state defendants. All of these persons, regardless of the wishes of their parents, guardians or the RRC, are entitled to the privileges set out in KRS 202B.040 and may not be committed unless a court makes the determinations required under that statute.

While KRS 202B does not delineate the specifics as to how and when the determination is to be made, KRS 202A.041 requires a preliminary hearing by the court within five days from the date of arrest of a suspected mentally ill person and then a final hearing within twenty-one days of the date of arrest to determine if the person should be involuntarily hospitalized for a period of sixty days. In addition, KRS 202A.071 and .076 require a preliminary hearing not less than six days from the date of the mentally ill person's detention and a final hearing with twenty-one days from the date of detention with a jury unless the mentally ill person and his or her attorney waive the right to a jury trial.

It is of course obvious that the great majority of mentally retarded persons who are profoundly or severely retarded are not brought for admission to MRRTCs as the result of an arrest. However, as it is typically the decision of parents or guardian to have the mentally retarded person admitted and as that decision then triggers the application procedure, it would seem that the date of application and actual admission, which are usually the same, should be considered as analogous to the date on which arrest occurs in the case of a mentally ill person. With that in mind, it would seem that in order to provide equal protection to the profoundly and severely retarded, the procedures set out in KRS 202A.071 and .076 must be followed.

The plaintiffs have wisely recognized that it will not be easy for the defendants to meet immediately the burdens which this decision places upon them. Therefore, the Court believes that the plaintiffs' suggestion of a sixty day con-

tinuance should be granted in order for the parties to work out the details of the procedures to be followed for profoundly and severely retarded persons who are over eighteen years of age.

Finally, we note defendants' argument that any orders entered by the Court requiring them to follow the state procedures advocated by the plaintiffs would result in a violation of the Supreme Courts mandate in *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89 (1984). *Pennhurst* holds that a federal court may not grant injunctive relief against state officials on the basis of state law, whether prospective or retroactive. In interpreting the Eleventh Amendment, the Court stated:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. *Id.* at 106.

In the case at bar, it is true that the state defendants are not following the dictates of their own statutes. However, this Court's grant of relief is not predicated upon that finding, but rather upon the constitutional principle of equal protection, that is, that a state may not deprive its citizens of the equal protection of its laws by unevenly and discriminatorily applying them.

Therefore, we have this day entered a partial summary judgment in accordance with this opinion.

Dated January 9, 1986

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0738-L(A)

SAMUEL DOE, et al., - - - - - *Plaintiffs,*

v.

BUDDY ADAMS, and
JACK FARLEY, - - - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This case is submitted to the Court on the motion of the plaintiff, Samuel Doe, for partial summary judgment against defendant Buddy Adams. Plaintiff is a mentally retarded person who has been institutionalized at Outwood for over ten years.

This action was brought on his behalf by his mother and next friend who contends that the defendant has refused to make available the pre-commitment and post-commitment procedural safeguards guaranteed under KRS 202A and 202B. More specifically, plaintiff alleges that every mentally retarded person who is committed to a Mental Retardation Residential Treatment Center (hereinafter MRRTC) may not be committed without a determination that he is mentally retarded, that he is a danger to himself or others, and that the least restrictive mode of treatment for that person requires placement in a hospital, institution or other MRRTC.

The complaint notes that KRS 202B.050 provides: "All rights guaranteed by KRS Chapter [ ] 202A . . . to men-

tally ill persons shall apply to mentally retarded persons." Plaintiff further contends that defendant has complied with the provisions of KRS 202A, 203 and 902 KAR 12.010, insofar as the mentally ill are concerned, but has denied the mentally retarded those rights.

Plaintiff also contends that he has been denied his rights under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment as well as his rights under 29 U.S.C. §794, KRS 202A, KRS 202B, KRS 210, and KRS 31.

Extensive depositions have been taken by the plaintiff and established without contradiction that the mentally retarded, whether admitted by their parents or by a guardian related to them, or by a statutory guardian who is not related to them are admitted to the MRRTC without the benefit of any court hearing. Instead, upon the decision made by the defendant that the person for whom admission is sought is mentally retarded, such a person is admitted.

The undisputed evidence reflects that in the past few years, in only three cases concerning mentally retarded persons was a civil commitment proceeding instituted, and only one case in the last year. It is also known that approximately 1,100 petitions for involuntary commitment of mentally ill persons are filed yearly in Jefferson County alone; but since July 1982, not one case involving a mentally retarded person has been subject to the KRS 202B procedure.

The written admissions' policy of the defendant conditions admission on (a) the availability of appropriate alternative residential and training programs in the community, (b) the availability of appropriate training and living space within the recommended facility, (c) the severity of the applicant's handicap, and (d) the status of the family situation. These standards of admissibility are administered by the Records Review Committee (hereinafter RRC),

a committee composed of various state employees, one of whom is a psychiatrist, with Dr. Susan Turner as chairperson for the past four years.

With respect to the confinement and release of persons placed in a MRRTC, it appears that the defendant, as a result of pressures from some parents of mentally retarded persons, has instituted an unwritten policy which gives to the parents of a mentally retarded person an absolute veto power the decision of the Committee, appointed by the MRRTC, to determine whether a mentally retarded person is suitable for release from a state MRRTC facility to alternative community placement.

This case is a sequel to *Kentucky Association For Retarded Citizens v. Conn*, 510 F. Supp. 1233 (W.D. Ky. 1980), *aff'd*, 674 F. 2d 582 (6th Cir. 1982), *cert. denied sub. nom., Bruington v. Conn*, —— U.S. ——, 103 S.Ct. 457 (1982). In *Conn*, among other holdings, the Court held that persons who are confined at MRRTC, Outwood, are, in fact, involuntary admissions with the exception of those very few who made their own applications to be admitted, and are entitled to the least restrictive alternative mode of treatment. *Id.* at 1235; 1249. We did not reach in that case, however, the question of whether a mentally retarded person had to go through a civil commitment proceeding prior to confinement in Outwood or in any other MRRTC.

Plaintiff contends, with regard to the admissions' policy of the defendants, that all persons who are in MRRTCs are involuntarily committed and that they must be accorded the same rights as are accorded to involuntarily committed mentally ill persons under the provision of KRS 202A. More specifically, plaintiff contends that no mentally retarded persons may be committed except under KRS 202B.040, and that once a person is committed, there must be reauthorization of commitment at least every 360 days;

and further that if, at any time, the resident no longer meets the standards of commitment, he is entitled to release.

To bolster that contention, plaintiff argues that the doctrine of collateral estoppel must be applied to our holding in *Kentucky Association For Retarded Citizens v. Conn, supra,* and that every person in a MRRTC is involuntarily committed. Plaintiff also relies upon the provisions of KRS 202B.050 which provides that all rights guaranteed by KRS 202A and 210 to mentally ill persons shall apply to mentally retarded persons.

We proceed first to resolution of the collateral estoppel issue. The leading case on that issue is that of *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979), where the Supreme Court held that a party who had issues of fact adjudicated adversely to it in an equitable action could be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party. In *Parklane,* the Supreme Court noted that collateral estoppel could only be applied against parties who had a "full and fair" opportunity to litigate their claims. *Id.* at 332.

Since *Parklane, supra, Hardy v. Johns-Manville Sales Corporation,* 681 F.2d 334 (5th Cir. 1982), states that in order for collateral estoppel to be invoked, the issue to be concluded must be identical to that in the prior action, it must have been actually litigated, and the determintion made in the issue in the prior action must have been necessary and essential to the resulting judgment. *Id.* at 341.

Further, as stated in *Hardy* at 341, "[i]f it appears that a judgment may have been based on more than one of several distinctive matters in litigation and there is no indication which issue it was based on or which issue was fully litigated, such judgment will not preclude, under the doctrine of collateral estoppel, relitigation of any of the issues." (citing authorities).

In *Conn, supra,* the plaintiffs sought to prevent the defendants from constructing a new facility for 175 mentally retarded citizens. They also alleged violations of the Fourteenth Amendment by denial of the "right to treatment, right to the least restrictive alternative, and right to freedom from harm." *Id.* at 1237. At 1247, 48-49, the Court was concerned with the question of whether state law forbid the construction of the new Outwood; and if it did not, what were the rights of those people who would be residents of the new Outwood or who were residents of the old Outwood.

After holding that Kentucky did not ban the use of construction of new facilities for the treatment and care of mentally retarded persons, the Court went on the analyze the rights of persons who would be or who were confined at Outwood. We noted that KRS 202B.040 provided for a court determination before any person who was mentally retarded could be involuntarily committed. On pp. 1248 and 1249, the Court stated its belief that commitments of mentally retarded persons who were confined at Outwood were, in fact, involuntarily confined, with the exception of those very few who made their own applications to be admitted. The Court went on to hold that those few who were truly voluntary residents were entitled to release on their own requests.

In the judgment, the Court specifically declared that each resident confined at Outwood or to be confined at the new Outwood would be considered to be involuntarily committed, with the exception of those adult individuals who applied voluntarily. The judgment went on to state that the voluntarily confined residents were entitled to be discharged upon their application for discharge, and that the other residents were entitled to seek relief from actions approved by their guardians or committees for or against admission and discharge. *Id.* at 1235.

The Court went on to state in the judgment that each resident committed by the action of a guardian or committee is entitled to the rights set out in K.R.S. 220B.040 and 202B.060, and to release where a determination is made by an interdisciplinary team that the resident presents no immediate danger or threat of danger to self or others, and where the least restrictive alternative mode of treatment is in a living facility, and where there is in existence such a facility which can adequately treat and supervise the residents. *Id.* at 1235.

The Court has reviewed the briefs of the parties and in applying the doctrine of collateral estoppel, we note that the issue raised in the case at bar, relative to the allegedly improper admission of mental retarded persons, is not identical to the issue raised in *Conn*, and which the Court discussed, which was the right to the least restrictive alternative mode of treatment.

It is noted at p. 1248, the Court was basically concerned with involuntary commitment in the context of the right to the least restrictive mode of treatment. The Court did not specifically determine that all mentally retarded persons were entitled to the protections associated to involuntarily committed mentally ill persons, or the protections set out in KRS 202B.040; but simply reached the decision that there was no merit to the argument made by the defendants that retarded persons were voluntary residents of MRRTCs and were not entitled to the least restrictive mode of treatment.

Beliving that collateral estoppel does not bar the Court from an independant determination as to what the rights of mentally retarded persons are in the context of their admission to MRRTCs, we hold first that KRS 202B.050 and KRS 202B.020 mandate that hospitalization for the care and treatment of mentally retarded persons are to be provided in the same manner as hospitalization of mentally

ill persons, as set forth in KRS 387, 210, 202A.020, 202A.231 and 202A.201; except that when a court appoints persons to examine allegedly mentally retarded persons, such persons, where possible, shall have made a study of mental retardation. Also, there is an exception that a qualified mental retardation professional may be substituted for one, but not both positions when certification is required for involuntary hospitalization. See KRS 220B.020.

KRS 202A.021 speaks in terms of voluntary admissions and allows any adult to be voluntarily admitted to a hospital upon his own application by an authorized physician. Any unemancipated person under 18 may be admitted to a mental hospital following his application signed by parent or guardian. Any child between the ages of 14 and 18 may admit himself or herself to a mental hospital, provided that the child's parents or legal guardian are notified immediately of the admission.

KRS 202A.021, (2), (3), and (4) allow a physician to discharge any voluntary patient, including anyone under 18 years of age, whose hospitalization he believes to be no longer necessary. In the alternative, if the voluntary patient requests release, or if a child represented by a parent or committee requests release, or has a release requested by his parent or committee, he must be released unless further detained under other provisions of the statute. Also, at any time during the period of hospitalization, either the child or his parents or legal guardian may seek an independent medical review of the appropriateness of the decision to continue his confinement or to release him.

Since KRS 202B.020 specifically provides for hospitalization of mentally retarded persons by the same procedures as those set out in KRS 202A.021, it is readily apparent that any mentally retarded person under 18 years of age may be admitted by his parents or guardian, and

that such admission in the eyes of the Legislature was to be treated as analogous to a voluntary admission.

We note in this connection that in the case of *Secretary of Public Welfare of Pennsylvania* v. *Institutionalized Juveniles,* 442 U.S. 640 (1979), the Supreme Court described the placing of mentally retarded and mentally ill children under 18 by application of their parents or guardians as being application for voluntary commitment. *Id.* 646, 47.

Our conclusion that the Legislature did not intend that all mentally retarded persons who were placed in MRRTCs should be considered as being involuntarily committed is fortified by the fact that KRS 202B.040 specifically refers to the due process procedures to be followed in the event of a mentally retarded person who was involuntarily committed. That section tracks the language found in KRS 202A.026. When KRS 202B.040 is considered, along with KRS 202B.020 and KRS 202A.021, it is apparent that the Legislature wished to differentiate between persons admitted by their parents and/or guardians and those persons whom the authorities felt, for some reason, should be hospitalized in a MRRTC in the absence of an application by the guardian, committee or parents.

Analyzing further KRS 202A.021, it is significant to note that the only restrictions placed upon the admission of a child whose application is signed by a parent or guardian is that an authorized staff physician must grant permission for the admission. The statute then makes ample provision for the due process rights of the mentally ill person to be discharged at any time, since that decision may be accomplished by either the decision of a physician or the decision of the parents or guardian, unless the hospital authorities think release inadvisable, in which case the provisions for involuntary confinement are brought into play.

We conclude, with respect to admissions, that the defendants are not violating the Equal Protection Clause of the Fourteenth Amendment. The mentally retarded person or child may not be confined in a MRRTC without the approval of an Admissions Committee, which must consider the four criteria for admissions referred to on pages 2 and 3 of this opinion. Since that Committee has as one of its employees a psychiatrist, we believe that admission by it may be considered as equivalent to the admission of mentally ill persons by an authorized staff physician.

The Court notes that the only standard imposed upon the staff physician in KRS 202A.021 inferentially is that the person who has applied for admission is mentally ill or has symptoms of mental illness. While we would prefer, in light of *Parham* v. *J. R., supra,* that the committee be composed entirely of physicians, we note that in *Secy. of Public Welfare* v. *Institutionalized Juveniles, supra,* the mentally retarded children are admitted to the hospital on the application of parents or guardian, and the referral of a physician, accompanied by a medical or psychological evaluation. The Pennsylvania statute then goes on to place upon the Director of the hospital the duty of making an independent examination of the child; and if he disagrees with the referring physician, the child must be discharged. If the child is admitted, then a staff conference is held and it is decided whether or not the child needs hospitalization.

Finally, we note that there is a class of mentally retarded persons who are, generally speaking, adults and who are committed to MRRTCs upon the application a State-appointed guardian, such as Maxine Pulliam. See *Conn, supra,* referring to the fact that 155 persons were admitted to Outwood as a result of an application filed by Maxine Pulliam, an employee of the State. The Supreme Court addressed this problem in *Parham, supra,* at pp. 617-

19, where they stated that although there are differences in the situation of persons who are wards of the State at the time of admission, as contrasted with the situation of children who have natural parents requesting admission, these differences are not so great as to require different procedures at the time of the child's initial admission to the hospital. The Court went on to state that there was no evidence that the State's application for admission was submitted for reasons unrelated to the child's need for treatment. *Id.* at 618.

We note the similarities between the procedures now employed by the defendants for the admission of mentally retarded persons and those employed for the voluntary admission of adults and children as provided in KRS 202A.021, KRS 202B.020 and KRS 202B.050.

We note also that KRS 202A.171 requires the discharge of an involuntary patient when he no longer meets the criteria for involuntary hospitalization. No specific reference is made in KRS 202B.020 and KRS 202A.171. However, since KRS 202B.050 guarantees the rights of KRS 202A to mentally retarded persons, it follows that an involuntary mentally retarded person must be discharged when he no longer meets the criteria for confinement set out in KRS 202B.040. Again, that type of proceeding and relief would apply only to the very small number of mentally retarded persons who are not admitted by the application of either a natural parent or a guardian and would not apply to the great majority who are considered to be voluntarily confined.

Finally, we note that the policy of the defendant, allowing parents an absolute veto power over the decision of the Release Committee to place a mentally retarded person in the community, is in conflict with the holding in *Parham* v. *J.R., supra.* In *Parham,* the Court held that its prece-

dent allowed parents to retain a substantial, if not dominant, role in the decision to voluntarily admit their children to mental hospitals. The Court also concluded that the child's rights and the nature of the commitment decision are such that the parents cannot always have absolute and unreviewable discretion in deciding whether to have a child institutionalized. Of course, they retain plenary authority to seek such care for their children, subject to a doctor's independent examination and medical judgment. See 442 U.S. at 604.

The amicus curiae relies upon the most recent decision in *Halderman* v. *Pennhurst State School & Hospital*, 707 F. 2d 702 (3rd Cir. 1983). In that case, a two-to-one decision was entered holding that the district court erred when it held that a mentally retarded person could be transferred from Pennhurst, the state institution for the mentally retarded, where he had resided for over nine years, to a community living arrangement (hereinafter CLA). The district court had mandated that individual habilitation plans (IHPs) be developed supporting the transfer of Pennhurst school age residents to CLAs. Parents were allowed to participate as members of their child's IHP team, but parental consent to a transfer was not required. The IHP was to be submitted first to a court-appointed master; and if the parents objected to the recommendations of the IHP, they could demand a hearing to determine whether the Pennhurst arrangements were more beneficial to the resident's habitation than the living arrangements in the community. The master would then make a report which could be excepted to by the parents and then heard by the district court.

Circuit Judge Aldisert, who wrote the majority opinion, held that the "district court did not afford to the parents' views the consideration that the Constitution demands."

Id. at 711. Judge Aldisert stated that parents have a substantial right to direct the upbringing of their minor children, which can only be overcome either by a showing of abuse or neglect or by proof of a significant governmental interest running counter to the express parental desires. He then went on to hold that since there was evidence, both for and against the transfer decision, there was insufficient proof of a significant governmental interest to negate the parents' substantial constitutional rights. *Id.* at 710.

Circuit Judge Rosenn, in his concuring opinion, stated that he believed that when "parents' interests clearly collided with the interest of their minor child, whatever authority parents may ordinarily possess is necessarily subordinated to the child's best interest, notwithstanding the recognized right of parents in the well-being of their children." *Id.* at 712.

Judge Rosenn went on to hold that although the parents did not have an absolute right in the case, the master should have ordered a transfer only if there were a compelling justification for the transfer. He based his opinion, in part, upon the discussion in *Parham* v. *J. R.*, *supra*, to the effect that there is a fundamental presumption that parents act in the best interest of their children, quoting *Parham*, 442 U.S. at 602.

In his dissenting opinion, Circuit Judge Sloviter pointed out that where the parents have voluntarily relinquished custody of a child to a mental retardation facility, the parental constitutional right referred to by Judge Aldisert could not govern the decision in *Halderman*, *supra*. He also pointed out that *Parham*, *supra*, requires some kind of inquiry by a neutral fact-finder to determine whether the statutory requirements for admission are satisfied, citing 442 U.S. at 606. Again, as Judge Sloviter noted, the parents did not have the final decision-making authority when the child's liberty interest was at stake.

Also, as Judge Sloviter pointed out, the court was concerned with the child's separate constitutional rights, and the court could not necessarily rely upon the parental authority to vindicate the child's independent interest. However, the parents should be given a full opportunity to show that interest in the decision was congruent with the child's best interest and right.

We believe that this analysis of *Halderman, supra,* reflects that even Judge Aldisert did not take the view that parents have an absolute veto power over the decision of a neutral fact-finder to release a mentally retarded child. It is true though, as pointed out by Judge Sloviter in his dissent, that although both Judge Aldisert and Judge Rosenn disclaim the right of the parents to an absolute veto, they in effect held that one existed.

This Court's analysis of *Parham, supra,* and *Halderman, supra,* results in our holding that the defendants cannot allow parents to veto a decision made by a neutral committee or decision-maker as to the release of their child, although the committee certainly must give much weight to the opinions of the parents and to their part in the process of determining whether the child should be transferred.

A partial summary judgment in accordance with these findings of fact, conclusions of law has been entered this day.

Dated 3/28/84

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record